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Zoned for Residential Uses"-Like Prayer? Home Worship and Municipal Opposition in LeBlanc-Sternberg v. Fletcher

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"Zoned for Residential Uses"—Like Prayer? Home Worship and Municipal Opposition in *LeBlanc-Sternberg v. Fletcher*[1]

I. INTRODUCTION

In seventeenth-century Europe, small clusters of believers gathered in their homes to worship according to their minority faith. When persecution drove them from those homes, these Pilgrims sought the freedom to pray in America. Today, a cluster of Orthodox Jews in southern New York state, led by Rabbi Yitzchok LeBlanc-Sternberg, are battling for the right to worship in their homes against hostile neighbors who have attempted to drive them out through zoning restrictions on their religion. This Note will examine the contours of this decade-long legal controversy in New York and its impact on Free Exercise jurisprudence in the land use context.

Despite the abundance of scholarship on the Supreme Court's interpretations of the Free Exercise Clause, how Free Exercise claims actually fare in lower courts has received scant attention.[2] By assessing the lifecycle of this case, this Note examines how Free Exercise principles play out in resolving a religious land use dispute. Part II provides background on modern Free Exercise jurisprudence and particularly its clash with land use regulation, including restrictions on home worship. Part III describes the facts and reasoning of the Second Circuit's three rulings in the *LeBlanc-Sternberg v. Fletcher*

1. This controversy reached the Second Circuit of the United States Court of Appeals three times, each time entitled *LeBlanc-Sternberg v. Fletcher*. *See* 67 F.3d 412 (2d Cir. 1995); No. 96-6149, 1996 U.S. App. LEXIS 31,800 at *6. (2d Cir. Dec. 6, 1996); 143 F.3d 748 (2d Cir. 1998).

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2. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1408 (1992).

controversy. Part IV assesses the court's holdings, analyzes their impact, and recommends improvements for protecting Free Exercise rights in zoning disputes. Part V concludes that the *Fletcher* precedents, particularly their narrowing of governmental discretion in zoning, modestly and properly raise the level of legal protection for religious exercise.

II. BACKGROUND ON ZONING AND RELIGION

The First Amendment's religion clauses champion two of our nation's treasured principles. This case concerns the Free Exercise Clause: "Congress shall make no law . . . prohibiting the free exercise [of religion]."[3] What the Constitution leaves *unsaid* frames the debate on religious land use: (1) what scope of Free Exercise does the Constitution mandate, and (2) how does a court balance a religious congregation's liberty and property rights against the larger community's interests? Religious land use jurisprudence has long sought to appropriately weigh these fundamental values of our Constitution and our people.

A. Modern Judicial Approach to Free Exercise

In 1963, the Supreme Court set the standard for modern Free Exercise jurisprudence in *Sherbert v. Verner*.[4] The Court in *Sherbert* created a test to balance state action against its burden on religious exercise. In essence, state action was constitutional only if it survived strict scrutiny—that is, if it both advanced a *compelling* state interest and employed the least restrictive means of advancing that interest. This standard placed a heavy burden of proof upon a governmental actor to justify the burdens its actions placed on religious exercise. But in 1990, the landmark decision in *Employment Division v. Smith*[5] abandoned that standard in dramatic fashion.

3. U.S. CONST. amend. I.

4. *See* 374 U.S. 398 (1963). This case involved a Seventh-Day Adventist who was fired because she would not work on Saturday, her faith's day of rest. When she applied for state unemployment benefits, she was disqualified for the same reason. The Court found that no compelling state interest justified a denial of benefits for her religious observance.

5. 494 U.S. 872 (1989), *reh'g denied*, 496 U.S. 913 (1990). As in *Sherbert*, at issue was the denial of unemployment benefits. The two plaintiffs, as part of the religious ceremony of the Native American Church, ingested a narcotic (peyote) that violated the state's drug laws, causing them to be fired for misconduct and thus ineligible for unemployment compensation. The Court upheld the denial of benefits.

In *Smith*, the Court lowered the standard to a very permissive and deferential one, akin to mere rational basis review.[6] According to *Smith,* any valid neutral law of general applicability need not be justified *even if* it burdens religious exercise. The Court downplayed its prior strict-scrutiny rulings as falling within a hybrid rights exception. If some other First Amendment right was implicated along with the Free Exercise claim, then the strict-scrutiny standard would still apply.[7] In sum, *Smith* seemed to sweep away the special protection religion had enjoyed.

In 1993, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[8] the Supreme Court articulated an important limitation on the *Smith* doctrine by elaborating on what constituted a neutral law of general applicability. The Court invalidated a city ordinance burdening religious exercise, even though it was neutral and generally applicable on its face. Without disturbing *Smith*'s holding that incidental burdens on religion need not be justified, the Court reasoned that the "Free Exercise Clause protects against governmental hostility which is masked as well as overt."[9] While the ordinance seemed neutral on its face, the majority zeroed in on the ordinance's intended effects. The record revealed a clear discriminatory purpose—to suppress an unpopular religious practice of a certain minority church.[10] Thus, "facial neutrality alone was not sufficient to escape rigorous scrutiny."[11] Three concurring justices urged re-examination or rejection of *Smith* as a serious misreading of the Constitution.[12] This examination of legislative purpose may significantly narrow the scope of what constitutes a neutral law.

The alarmed proponents of religious liberty have struggled since *Smith* to overturn its apparent demotion of religion as undeserving

6. *See Smith*, 494 U.S. at 876.

7. *See id.* at 881.

8. 508 U.S. 520 (1993).

9. *Id.* at 534.

10. The city ordinance ostensibly regulated the ritual killing of animals. But with exemptions for Kosher slaughter, the record clearly established a single target: banning the ceremonial animal sacrifices of the Santeria religion, whose theology fuses Catholicism and African tradition.

11. Kenneth Pearlman & Stuart Meck, *Land Use Controls and RFRA: Analysis and Predictions*, 2 NEXUS J. OPINION 127, 129 (1997).

12. *See Lukumi*, 508 U.S. at 559 (Souter, J., concurring); *id.* at 578 (Blackmun & O'Connor, JJ., concurring).

of special protection under the Constitution.[13] Their efforts so far have been largely frustrated.[14] By 1993, "a remarkable groundswell of opposition [to *Smith*] from religious and civil liberties groups across the political spectrum"[15] successfully urged Congress to enact the Religious Freedom Restoration Act ("RFRA") by sizeable margins.[16] The Act attempted to turn back the clock legislatively: it overturned *Smith* and restored the *Sherbert* test to Free Exercise jurisprudence.[17] RFRA declared the following test for Free Exercise claims: (1) Does the state regulation substantially burden religious practice? (2) Does the regulation advance a compelling state interest? (3) Is the regulation the least restrictive means of advancing that compelling interest?[18] In effect, any state regulation that "substantially burdened" religious exercise would be invalid, unless a compelling governmental interest justified the burden *and* the regulation was the least restrictive means of achieving that goal.

However, at its first opportunity, the Supreme Court struck down RFRA as unconstitutional in *City of Boerne v. Flores*[19] in 1997. In this one case converged "two of the most important and contested issues of modern constitutional law[:]" the scope of Free Exercise, and "the relationship between congressional and judicial authority in interpreting and enforcing constitutional rights."[20] The facts of *Boerne* centered on religious land use regulation, but the majority never reached that issue.[21] Instead of providing "guidance on religion and land use, the Court treated the case as '*Marbury v. Madison:* The Sequel,'"[22] focusing on whether Congress had the constitutional authority to enact RFRA. The Court ruled that Congress did not. By seeking to define the scope of Free Exercise, it had

13. *See infra* notes 15-18, 27-30 and accompanying text.

14. *See infra* notes 19-26 and accompanying text.

15. Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 159 (1997).

16. *See id*. at 160.

17. *See* 42 U.S.C. § 2000bb(b)(1) (1999).

18. *See* 42 U.S.C. § 2000bb-1(b) (1999).

19. 521 U.S. 507 (1997).

20. McConnell, *supra* note 15, at 153.

21. In *Boerne,* a growing Catholic congregation wished to renovate all but the facade of its officially landmarked, historic structure. The church claimed exemption under RFRA from the city's preservation ordinance, which prohibited the proposed renovation. *See Boerne,* 521 U.S. at 511.

22. Pearlman & Meck, *supra* note 11, at 131.

exceeded its power under the Fourteenth Amendment's Enforcement Clause.[23] The majority struck down RFRA's standard of judicial strict-scrutiny review of state and local governmental practices.[24] But *Boerne* contained a caveat critical to religious land use: Congress does have authority to legislate remedies (to protect religious exercise) if it has "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."[25] For reasons discussed below, zoning laws, like those at issue in *Fletcher,* may qualify as precisely such a category of laws, thereby justifying congressional regulation.[26]

RFRA's advocates, humbled by *Boerne*, have since regrouped behind a more narrowly tailored alternative: the proposed Religious Liberty Protection Act ("RLPA"), which is still before Congress.[27] The RLPA bill rectifies RFRA's exposed weaknesses by invoking firmer grounds for its authority.[28] It is backed by findings, including "a massive record of individualized assessment of land use plans, of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones."[29] According to the caveat in *Boerne*, this record of actual discrimination improves

23. *See* U.S. CONST. amend. XIV, § 5.

24. *See* Daniel O. Conkle, *Congressional Alternatives in Wake of* City of Boerne v. Flores*: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement,* 20 U. ARK. LITTLE ROCK L.J. 633, 633 (1998). The opinion did not explicitly invalidate "RFRA insofar as it applies to *federal* laws and practices." *See id.* at n.5. But because state and local—not federal—regulations predominate in Free Exercise cases, and especially in the land use context, this possibly surviving remnant of RFRA is not very significant and beyond the scope of this Note.

25. *Boerne*, 521 U.S. at 532.

26. *See* discussion *infra* Parts IV.B.2, IV.C.1.

27. *See* H.R. 4019, 105th Cong. (1998).

28. RLPA derives its authority from the Commerce and Spending Clauses, not the Fourteenth Amendment's Enforcement Clause. *See* H.R. 4019, 105th Cong. § 2(a) (1998). According to one scholar, RLPA's invocation of the Spending Clause "is an utterly routine exercise of authority under the Spending Power," and the Commerce Power is also appropriate as "our Constitution's means of demarcating the federal from the state spheres of regulation." *Religious Liberty Protection Act of 1998: Hearings on S. 2148 Before the Senate Comm. on the Judiciary,* June 23, 1998 (statement of Michael McConnell, Professor, University of Utah Law School), *available in* LEXIS, Federal News Service File [hereinafter McConnell Statement].

29. *Legislation to Protect Religious Liberty: Hearings Before the Senate Comm. on the Judiciary*, Sept. 9, 1999 (statement of Douglas Laycock, Professor, University of Texas Law School) *available in* LEXIS, Federal News Service File [hereinafter Laycock 1999 Senate Statement].

the likelihood that RLPA would be found constitutional. Lastly, RLPA "is not subject to the separation of powers objections that ultimately doomed RFRA."[30]

B. Land Use Regulation and Free Exercise

The interests of land use regulation and religious exercise clash in what is still an open-ended debate in the courts. Traditionally a local issue, zoning disputes began to spill over into federal courts after the Supreme Court in *Village of Euclid v. Ambler Realty Co.*[31] ruled that zoning ordinances are constitutional unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[32] When deciding if zoning ordinances burden religious exercise, lower courts have diverged in their decisions, in part because "unlike other aspects of the First Amendment where the federal courts have given substantial guidance, decisions on religion and land use have more often come at the state level and state practice varies widely."[33] To date, the Supreme Court has never provided direct guidance on how to evaluate Free Exercise claims—including those stemming from home worship—in the land use context.[34]

The extent to which the *Smith* doctrine applies to land use regulation is unclear.[35] Because it only applies to neutral rules of *general* applicability, it may not even reach land use laws. The key determination (not yet resolved by the courts) is whether zoning laws impacting religious institutions are "of general applicability or involve particularized determinations for a single site."[36] If generally applicable, then the *Smith* doctrine will most likely apply. But strong evidence suggests that zoning decisions are particularized determinations. Zoning ordinances are fraught "with exemptions and discretionary

30. McConnell Statement, *supra* note 28. RLPA avoids confrontation by accepting the Supreme Court's interpretation of the Free Exercise Clause. It merely *adds* federal statutory protection for religion, just as certain environmental and disability laws are promoted to the maximum constitutional extent of federal power, but are not themselves constitutional rights.

31. 272 U.S. 365 (1926).

32. *Id.* at 395 (citation omitted).

33. Pearlman & Meck, *supra* note 11, at 128.

34. *See* Ann Wehener, *When a House Is Not a Home but a Church: A Proposal for Protection of Home Worship from Zoning Ordinances,* 22 CAP. U. L. REV. 491, 493 (1993).

35. *See* McConnell, *supra* note 15, at 167 (enumerating situations in which *Smith* does not apply and strict scrutiny for Free Exercise claims does).

36. Pearlman & Meck, *supra* note 11, at 134.

mechanisms" that lead to "highly individualized solutions to land use issues."[37] Though most zoning ordinances are enacted by *legislative* bodies (i.e., a city council), "many consider these actions to be administrative in nature" because (unelected) planning commissions so profoundly shape these ordinances.[38] For example, zoning bodies have discretion to place conditions on permits, to retain on-going review, and to grant exemptions and variances.[39] Because "[l]and use regulation is among the most individualized and least generally applicable bodies of law in our legal system,"[40] it is vulnerable to arguments that zoning decisions challenged by Free Exercise claims should receive strict judicial scrutiny.

A majority of courts recognize that places of worship enjoy a special status, but "none has gone so far as to claim all zoning ordinances that affect churches are impermissible."[41] In these jurisdictions, "churches are presumed to contribute to the general welfare and morals of the surrounding community" and offer "an inherently beneficial quality" that presumptively or conclusively weighs in their favor.[42] New York has a history of affirmative protection of religious liberty, robustly interpreting the scope of Free Exercise.[43] Similarly, Indiana, Connecticut, Illinois, Ohio, and Washington have given special consideration to religious interests in zoning disputes.[44]

By contrast, a minority of states "are highly deferential to municipal decisions"[45] that inhibit places of worship, as long as the or-

37. ANGELA C. CARMELLA, *Land Use Regulation of Churches*, *in* THE STRUCTURE OF AMERICAN CHURCHES: AN INQUIRY INTO THE IMPACT OF LEGAL STRUCTURES ON RELIGIOUS FREEDOM (Craig Mousin ed., forthcoming 2000) (manuscript at 11, on file with author).

38. Pearlman & Meck, *supra* note 11, at 134.

39. *See* CARMELLA, *supra* note 37, at 11.

40. Douglas Laycock, *State RFRAs and Land Use Regulation,* 32 U.C. DAVIS L. REV. 755, 767 (1999).

41. Wehener, *supra* note 34, at 495.

42. Angela C. Carmella, *Liberty and Equality: Paradigms for the Protection of Religious Property Use*, 37 J. CHURCH & ST. 573, 592 (1995).

43. *See* Westchester Reform Temple v. Brown, 239 N.E.2d 891 (N.Y. 1968); Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor, 342 N.E.2d 534 (N.Y. 1975).

44. *See* Milharcic v. Metro. Bd. of Zoning Appeals, 489 N.E.2d 634 (Ind. Ct. App. 1986); Beit Havurah v. Zoning Bd. of Appeals, 418 A.2d 82 (Conn. 1979); Lubavitch Chabad House v. City of Evanston, 445 N.E.2d 343 (Ill. App. 1982), *cert. denied*, 464 U.S. 992 (1983); Libis v. Bd. of Zoning Appeals, 292 N.E.2d 642 (Ohio Ct. App. 1972); City of Sumner v. First Baptist Church of Sumner, 639 P.2d 1358 (Wash. 1982).

45. Carmella, *supra* note 42, at 593.

dinances bear "substantial relation to promoting the public health, safety, morals, and general welfare."[46] California and Florida, for example, defer to municipal bodies that exclude churches if an alternative location exists.[47] "[T]hese courts seldom [uphold] a free exercise challenge, reasoning that economic burdens on religious freedom do not rise to a constitutionally impermissible infringement."[48] They do not perceive the building of a church "as a fundamental tenet of a congregation's beliefs" and thus a denial does not constitute a "substantial" burden.[49]

C. Land Use Regulation and Home Worship

As a subset of religious land use issues, home worship raises all the important questions in a context closer to home.[50] One might suppose that home worship, because of its inherently private location and nature, would remain safely impervious to the tentacles of zoning regulations. According to one court, "Nothing can be more deeply personal than [a person's] desire to worship in the manner at issue here. He is at home. He is in prayer. He is with friends. He is entitled to be left alone."[51] However, courts differ in their view of the proper level of protection for individuals who gather in homes for religious purposes. One tendency emerges: "the larger and more public the assembly . . . , the more vulnerable the activity is to municipal restriction."[52]

Only three home worship cases have elicited rulings from federal courts of appeals.[53] In *Christian Gospel Church, Inc. v. City of San*

46. Wehener, *supra* note 34, at 495-96.

47. *See* CARMELLA, *supra* note 37, at 18.

48. Wehener, *supra* note 34, at 496. *See also* Braunfeld v. Brown, 366 U.S. 599 (1961) (causing religious observance to become *economically* disadvantageous did not impermissibly burden Free Exercise).

49. Wehener, *supra* note 34, at 496.

50. In this Note, "home worship" refers only to collective religious exercise in a residence by a group that includes *non*-residents. Though beyond the scope of this Note, home worship by *residents* also raises interesting legal issues. Who is a "resident" and how do zoning officials define household composition and family? While "[m]ost codes accommodate religious persons who seek to live together in a residence but who are not a 'family,'" e.g., nuns in a convent, "many living arrangements do not meet these specially defined uses, and the question continues to be litigated." Carmella, *supra* note 42, at 589 n.39.

51. State v. Cameron, 498 A.2d 1217, 1228 (N.J. 1985).

52. Carmella, *supra* note 42, at 589.

53. Another home worship case, decided on the grounds of vagueness and thus never reaching the Free Exercise claim, is *Nichols v. Planning and Zoning Commission of the Town of*

Francisco,[54] the Ninth Circuit upheld the denial of a conditional use permit for a church that wished to move its worship meetings into a residential home. The congregation had been meeting in a rented hotel banquet room. Short of claiming a religious "need" to relocate, the church explained why worshipping in a home was important to them. It was motivated by both doctrine (the Second Coming's imminence obviated the building of nonresidential structures) and practical considerations (independence from commercial establishments saves money and enhances flexibility).[55] The court declined to invalidate the city's permit denial. It reasoned that the denial did not restrict any *current* exercise of religion, and restricting only a desired future *change* in that exercise was not a sufficiently substantial burden.[56]

In *Grosz v. City of Miami Beach*,[57] the Eleventh Circuit similarly upheld a city ordinance that enjoined Rabbi Armin Grosz from conducting prayers with fellow Orthodox Jews in his garage in Miami. The tenets of Orthodox Judaism require a quorum ("*minyan*") in order to conduct worship services. This sets Orthodox Jews apart as a particularly sympathetic subset of home-worshipping plaintiffs: their doctrine compels the gathering of a certain minimum of members.[58] Nevertheless, the court found that that the city's zoning interests outweighed the burden on the congregants' Free Exercise interest.[59] It reasoned that the availability of a Jewish temple nearby made this burden on religion permissible, despite the congregants' belief that worship in this rabbi's home was more effective.[60]

RFRA reversed Rabbi Grosz's fortunes.[61] In 1996, the Eleventh Circuit reasoned that, while its first ruling found the governmental interest did outweigh the burden on religion, RFRA now mandated

Stratford, 667 F. Supp. 72 (D. Conn. 1987).

54. 896 F.2d 1221 (9th Cir. 1990), *cert. denied*, 498 U.S. 999 (1991).

55. *See id.* at 1224.

56. *See id.*

57. 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

58. This requirement for a quorum (or "*minyan*") comes from the Jewish Talmud (a sacred code of religious practice) and figures prominently in this Note's lead case, as discussed below. A *minyan* consists of at least ten observant males age thirteen or older.

59. *See Grosz*, 721 F.2d at 741.

60. *See id.* at 739. Rabbi Grosz defied the court's order to cease his prayers, finding the court no more persuasive than the Nazi persecution he had survived.

61. Grosz v. City of Miami Beach, 82 F.3d 1005 (11th Cir. 1996).

a different inquiry: did the ordinance substantially burden religion?[62] The court ruled that it did, thus triggering strict scrutiny and invalidation of the ordinance. Since RFRA's demise, this controversy's resolution is again uncertain.

To summarize, Free Exercise claimants must first demonstrate that the challenged state action imposes "a substantial burden on religious exercise," but this initial showing "has historically been a problem for home worshippers."[63] Courts handling suits brought by advocates of home worship "have focused on whether the effect on religion is incidental or substantial."[64] Because "[e]conomic hardship has not sufficed as a substantial burden" and alternative locations are usually (at least theoretically) available, courts seem "reluctant to find burdens on religion when home worship is involved."[65] Nevertheless, in *LeBlanc-Sternberg v. Fletcher*,[66] the third home worship case to reach a federal court of appeals, the court reached a dramatically different conclusion.

III. THE *LEBLANC-STERNBERG V. FLETCHER* CONTROVERSY

The legal struggle between the Orthodox Jews and certain residents of Ramapo, New York, spans a decade.[67] The Second Circuit Court of Appeals has issued three rulings (*Fletcher I, II*, and *III*) on different aspects of the case, most recently in May 1998.[68] All three have favored the religious liberty interests of the Jewish plaintiffs. The remainder of this Note will summarize the Second Circuit's

62. *Id.* at 1007.

63. Wehener, *supra* note 34, at 506. Thus, even the liberty-oriented RFRA regime provided only limited assistance to home worship claims. RFRA supported free exercise claims by requiring a compelling governmental interest to outweigh the substantial burden. Home worshippers struggle to establish the burden itself as substantial. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 946 (1989) (exploring the distinction between permissible and impermissible burdens).

64. Wehener, *supra* note 34, at 497. *See generally* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996) (arguing that even *incidental* burdens on rights should be subject to some form of heightened scrutiny).

65. Wehener, *supra* note 34, at 502.

66. 67 F.3d 412 (2d Cir. 1995).

67. The plaintiffs filed their original complaint in 1991, which matured into *LeBlanc-Sternberg v. Fletcher*, 781 F. Supp. 261 (S.D.N.Y. 1991), *rev'd*, 67 F.3d 412 (2d Cir. 1995).

68. *See* LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995) [hereinafter *Fletcher I*]; LeBlanc-Sternberg v. Fletcher, No. 96-6149, 1996 U.S. App. LEXIS 31800, at *6. (2d Cir. Dec. 6, 1996) [hereinafter *Fletcher II*]; LeBlanc-Strenberg v. Fletcher, 143 F.3d 748 (2d Cir. 1998) [hereinafter *Fletcher III*].

three rulings and assess their aggregate impact on Free Exercise and home worship in land use disputes.

A. Round One: Free Exercise Rights Vindicated

1. The facts

The Town of Ramapo, New York, is a large area that embraces both incorporated villages and unincorporated sections.[69] A significant influx of Orthodox Jewry, including members of its Hasidic subgroup, settled in the unincorporated Airmont section of Ramapo during the 1980s.

a. Religious needs of the new Orthodox neighbors. The strict religious observance of Orthodox Jews mandates certain conditions for worship services. Central religious practices, such as reciting certain prayers and reading from the Torah, require a quorum ("*minyan*") of at least ten men over the age of thirteen. Observing the familiar commandment to "rest" on the Sabbath, Jewish law forbids the use of vehicular transportation and circumscribes the area a believer can travel on the Sabbath and holidays. Thus, for Orthodox Jews to exercise their religion, they must "be able to gather for worship in congregations *large* enough to ensure the presence of a minyan, and *close* enough to the congregants' homes to allow them to walk to services."[70]

These religious strictures made ordinary, free-standing houses of worship impractical for the Orthodox Jews in Ramapo. Ramapo's zoning code allowed such structures only on plots of at least two acres. Building such a synagogue "would cost as much as $750,000, an expenditure that would require the support of approximately 150 families," many more than the small cluster of Orthodox families that had moved to Ramapo.[71] Instead, Ramapo accommodated the Orthodox congregation with a favorable interpretation of its zoning provision for home professional offices ("HPOs"). The provision permits certain professionals, including clergy, to operate offices in the home. In the mid-1980s, Ramapo interpreted this HPO provision as permitting home synagogues ("*shteebles*") that enabled rabbis

69. *See Fletcher I*, 67 F.3d at 417-18.

70. *Id.* at 417 (emphasis added).

71. *Id.* at 417-18.

to conduct religious services in their homes for groups of up to forty-nine individuals.[72]

b. The village's exclusionary moves. However, certain residents of Ramapo's Airmont section opposed this and other zoning accommodations that could encourage immigration of Orthodox Jews.[73] These residents formed the Airmont Civic Association, Inc. ("ACA") which advocated the incorporation of the Airmont section into a village that could adopt its own zoning code. The ACA vigorously opposed any further zoning accommodations, such as granting Rabbi Sternberg's application to conduct worship services in his home. ACA members "posted themselves outside of Rabbi Sternberg's home to count the arriving congregants; [one ACA leader] at other times parked in front of the homes of other Orthodox Jews during their prayer times."[74] The ACA's campaign for incorporation underscored, as its primary purpose, the "desire to keep the Orthodox and Hasidic Jews out."[75] One statement promulgated by ACA leaders bristled at the prospect of cohabitating with "'a bunch of people who insist on living in the past. I am not prejudice [sic] in any way, shape or form but i [sic] *will not* have a hasidic community in my backyard.'"[76] The public vote for incorporation passed by a three-to-one margin, and the Village of Airmont was formally incorporated in April 1991. A village trustee stated that now "there are other ways we can harass them."[77] Two days later, the plaintiffs filed suit.

In January 1993, the Village of Airmont enacted its own zoning code, which rewrote Ramapo's accommodating HPO provision. The Airmont version demanded that the HPO be only "incidental and secondary to the use . . . for dwelling" and "shall not generate activities that come into a residential area so as to detract from the residential character of the area."[78] The village reserved to itself the discretion of interpretation: "*Any* aggrieved person shall apply to the

72. *Id.*

73. *See* LeBlanc-Sternberg v. Fletcher, 781 F. Supp. 261, 271 (S.D.N.Y. 1991).

74. *Fletcher I*, 67 F.3d at 420.

75. *Id.* at 418.

76. *Id.* at 419.

77. *Id.* at 420.

78. *Id.* (quoting VILLAGE OF AIRMONT, N.Y., ZONING CODE, art. XVIII(2) (emphasis omitted)).

Zoning Board of Appeals for an interpretation as to whether or not a proposed activity or use" is a permissible HPO.[79]

Though the Village of Airmont's zoning code had not yet been applied against its Orthodox Jews (Rabbi Sternberg's zoning accommodation application was eventually granted), the Village of Airmont's mayor and three of its four trustees opposed an interpretation of the HPO provision that allowed worship services in clergy homes. Evidence suggested the zoning concerns of the trustees and the ACA were "selective, focusing only on Orthodox [home] synagogues" and their handful of pious pedestrians as sources of "traffic or noise."[80] During this same period, the village ignored the actual traffic and noise of a local country club, described by one witness as "'a total nightmare.'"[81] Similarly, it unanimously approved a variance to accommodate a too-tall Catholic spire, with one trustee advocating the approval "'because this is the Catholic church [sic] that wants it.'"[82]

2. History in the lower court

Bringing suit in the Southern District of New York, Rabbi Sternberg spearheaded an action by several Orthodox Jews against the Village of Airmont and its leading officers, both individually and in their official capacity. The United States Attorney filed a parallel action (the two were later joined), similarly alleging that the defendants' acts violated the Constitution's Free Exercise Clause and the Fair Housing Act ("FHA"). At trial, the jury found for the individual defendants *but* found the village had violated the plaintiffs' Free Exercise and FHA rights.[83] However, the jury awarded no damages. The district judge set aside the jury's verdict against the village, finding it inconsistent with an award of no damages, and denied the plaintiffs any relief against the Village of Airmont.[84]

79. *Id.* (emphasis added).

80. *Id.* at 421.

81. *Id.* (quoting from Trial Transcript at 5335).

82. *Id.* (quoting from Trial Transcript at 3025).

83. *See id.* at 422.

84. *See* LeBlanc-Sternberg v. Fletcher, 846 F.Supp. 294, 295 (1994).

3. The Second Circuit's ruling

On appeal, in 1995, the Second Circuit reversed the district court's rulings regarding the FHA and Free Exercise claims against the village, reinstating the jury's verdict.[85] It remanded the case with an order for injunctive relief and nominal damages for the plaintiffs. The court affirmed the dismissal of the private plaintiffs' claims against the individual defendants.

The court rehearsed how the First Amendment, by incorporation through the Fourteenth Amendment, bars the states from prohibiting the free exercise of religion.[86] Referencing the fresh ruling in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the court recognized that

> it is unclear to what extent this prohibition requires states affirmatively to accommodate religious practice . . . [but] it is firmly established that "'if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law . . . is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest . . . .' [A] law targeting religious beliefs as such is never permissible."[87]

Finding the jury's verdict (that a desire to impede religious exercise *did* motivate the ordinance) "fully supportable" by the evidence, the court reinstated the verdict and invalidated the ordinance.[88] Because "the loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury,"[89] the court noted that a victim can have standing before the actual injury occurs. The court explained that Free Exercise violations can also trigger causes of action under federal civil rights law.[90] Besides the Free Exercise claim, the Second Circuit elaborated on why the evidence supported the verdict that the village had violated the FHA.[91]

85. *See Fletcher I*, 67 F.3d at 429.

86. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

87. *Fletcher I*, 67 F.3d at 426 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)).

88. *Id.* at 429.

89. *Id.* at 426.

90. *See* 42 U.S.C. §§ 1983, 1985(3) (1999).

91. Under the Fair Housing Act, it is unlawful "to refuse to sell or rent or otherwise make unavailable or deny, a dwelling to any person because of . . . religion." 42 U.S.C. § 3604(a) (1999). The FHA's prohibitions extend to discriminatory zoning restrictions as an unlawful method of "otherwise mak[ing] unavailable" housing. NAACP v. Town of Hunting-

B. Round Two: Comprehensive Injunctive Relief

On remand from the Second Circuit, the district court ordered three forms of injunctive relief. First, the court entered a prohibitory injunction enjoining the village from: (1) promoting religious discrimination; (2) denying equal protection to religions by use, interpretation, or enforcement of the zoning code; and (3) discriminating in housing based on religion, or interfering with the exercise of religion through housing. Second, the court entered a mandatory injunction requiring the village to revise its zoning code so that it could not be construed to prevent home worship, or to prevent persons from walking to and from places of religious worship. The court specifically called for an addition to [the Village of Airmont's] zoning code entitled "Residential Place of Worship." Such places were defined as "areas located within a residence that is used for the conducting of religious services." The order provided that such places "will be permitted by right on any day in all residential zones." Third, the court entered a mandatory injunction regarding notification and the retention of documents. The village was ordered to keep all documents related to zoning decisions, and notify the government of any such decisions, or of any meetings of planning or zoning boards at which applications touching on religious worship would be presented.[92]

In its appeal to the Second Circuit (*Fletcher II*), the Village of Airmont faulted the mandatory injunction for three reasons.[93] It viewed the injunction as: (1) disproportionate because the violation

ton, 844 F.2d 926, 938 (2d Cir.), *aff'd*, 488 U.S. 15 (1988). Any aggrieved person has standing to sue, even if injury by a discriminatory housing practice is prospective, as long as the aggrieved believes that such injury is *about to occur*. *See* 42 U.S.C. § 3602(i) (1999). Using a theory of disparate treatment, a plaintiff can establish an FHA violation by demonstrating that "animus against the protected group 'was a significant factor in the position taken' by the municipal decision-makers . . . ." *Fletcher I*, 67 F.3d at 425 (quoting United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1217, 1223, 1226 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988)). "Discriminatory intent may be inferred from the totality of the circumstances . . . ." *Id.*

92. *See Fletcher II*, 1996 U.S. App. LEXIS 31800, at *4-5 (quoting LeBlanc-Sternberg v. Fletcher, 922 F. Supp. 959, 964-65 & n.15 (S.D.N.Y. 1996)).

93. The village relied upon the criteria set forth in *Milliken v. Bradley*, 433 U.S. 267 (1977). The Supreme Court directed courts to consider three factors: (1) the remedy must be "determined by the nature and extent of the constitutional violation," (2) the injunction must be remedial in nature, i.e. restore the victims to the position they would have occupied but for the discriminatory conduct, and (3) the remedy must respect the role of state and local authorities in the management of their affairs. *Id.* at 280-81.

found by the court was merely predictive, and not existing; (2) not remedial; and (3) a judicial usurpation of the power of local government to modify the zoning regulations.

The Second Circuit rejected these three arguments. First, the court ruled that the village had already violated the plaintiffs' rights by passing a zoning code based on religious animus. The village's "egregious constitutional violation" called for a remedy that "cured the past constitutional violation and obviated the threat of future constitutional violations."[94] Second, the court reasoned that a prospective order can also be remedial because such orders may be necessary to ensure future compliance.[95] The injunction on the village "ensured that rights to free exercise of religion were unencumbered, and the constant threat of limitation of those rights was lifted."[96] Third, the court acknowledged that it had previously urged federal courts to defer initially to "a state's ability to remedy constitutional deficiencies" itself.[97] However, in this case, considering the village's *raison d'être* and the finding that future violations were "likely," the court found "no indication that the Village was going to make the changes necessary" to guarantee constitutional compliance.[98]

C. Round Three: What "Winning" Means

After receiving the injunctive relief affirmed by the Second Circuit, the private plaintiffs moved for an award of costs and attorneys' fees against the village (*Fletcher III*). Surprisingly, the same district court judge who had granted the plaintiffs the three injunctions

94. *Fletcher II*, 1996 U.S. App. LEXIS 31800 at *9 (emphasis added).

95. *See id.* at *11.

96. *Id.* at *12.

97. *Id.* (describing the holding in Dean v. Coughlin, 804 F.2d 207, 213 (2d. Cir. 1986)).

98. *Id.* at *12-13. The Second Circuit defended the extent of the relief generally by citing Supreme Court pronouncements that grant broad latitude in crafting an injunction. It is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." United States v. Paradise, 480 U.S. 149, 184 (1987) (citing Fullilove v. Klutznick, 448 U.S. 448, 508 (1980) (Powell, J., concurring)). The remedy must "so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). In fact, the Supreme Court had already approved a previous ruling by the Second Circuit in which the court specifically ordered revisions to a municipality's zoning code to secure its compliance with civil rights under the Constitution. *See* NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988).

found that the plaintiffs had not met the "prevailing party" standard, and thus denied the motion.[99]

In *Fletcher III* in 1998, the Second Circuit ruled for the appealing plaintiffs, reversing and remanding the case for a calculation of their award.[100] It reasoned that the established violations of plaintiffs' rights and their injunctive relief satisfied the prevailing party standard. The court found that the district judge "seriously understated the significance of the injunction."[101] Though the Orthodox Jewish plaintiffs had not yet been prevented from worshiping in their homes, "the injunction removed a substantial threat of such interference."[102] The district judge himself acknowledged that the changes ordered in the village's zoning code "'may be helpful to *any* new religious groups that desire to hold services in a private home in a residential area.'"[103] In remanding for calculation, the court reminded the district judge that the purpose of this award is "'to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives . . . .'"[104]

D. Round Four? Prospective Prohibitions

Since *Fletcher III*, the Second Circuit has made no further rulings on the Airmont "home synagogue" controversy. But it may yet get another chance. The Orthodox Jews of Airmont Village have applied to build a very large home synagogue, "designed to accommodate hundreds of people on a regular basis."[105] The space inside the proposed 16,580 square-foot structure would be split between residential and "devotional" uses, making it "larger by far than all but a very few residential dwellings and also larger than many free-standing

99. The judge reasoned that the plaintiffs had failed against all defendants except the village and had not secured the "major relief" (damages) that they sought. *Fletcher III*, 143 F.3d at 751 (reviewing the district court's reasons).

100. *See id.* Subsequently, the district judge balked at this order and requested instead that the remanded case be transferred to another judge on the district court bench. *See* Mark Hamblett, *Judge Balks at Order from 2d Circuit Panel; Calculation of Counsel Fees is Reassigned*, N.Y.L.J., July 24, 1998, at 1 col. 5.

101. *Fletcher III*, 143 F.3d at 759.

102. *Id.*

103. *Id.* at 760 (quoting the district court's unpublished memorandum decision of October 15, 1996, denying attorneys' fees).

104. *Id.* at 763 (quoting Kerr v. Quinn, 692 F.2d 875, 877 (2d Cir. 1982)).

105. Village of Airmont v. United States, No. 98-3801, 1999 U.S. Dist. LEXIS 2376, at *1, *9 (S.D.N.Y. Feb. 5, 1999).

houses of worship."[106] Characterizing this application as an "unexpected development," the village has expressed a desire to add restrictions to its zoning code to limit such structures.[107] Last year, the district court declined to grant the village *advance* approval of contemplated amendments to the village's zoning code.[108] The court invoked both a lack of jurisdiction (the United States—the defendant in the declaratory action—had not consented to be sued) and the general prohibition on advisory opinions, and thus dismissed the suit without reaching the merits.[109]

IV. ANALYSIS AND RECOMMENDATIONS

This Part assesses the Second Circuit's reasoning regarding the Free Exercise claim in *Fletcher I*. It then analyzes the impact of the court's three *Fletcher* holdings on this area of law. Lastly, it proposes several measures to reconcile the rights of religious exercise with the legitimate interests of local governmental administration.

A. Assessing the Court's Resolution

The Second Circuit properly reinstated the verdict in *Fletcher I* that found violations of plaintiffs' rights under the Free Exercise Clause and the FHA. On the Free Exercise claim, the court safely relied on the recent *Lukumi* precedent, which struck down an ordinance motivated by religious animus that targeted the religious worship of a particular group.[110] The consistency and unanimity of the Second Circuit's decisions through this decade-long controversy sends a strong warning to those municipalities contemplating exclusionary zoning ordinances. Though the composition of the three-judge panel changed in each round of litigation, all three rulings favored the Orthodox Jewish plaintiffs and all three were unanimous decisions.

The court did not elaborate, however, on the proper standard for determining impermissible religious animus. Specifically, it failed to explain how much animus constitutes a "significant factor" and which sources of animus are impermissible. Judging from the facts it

106. *Id.* at *3.
107. *Id.* at *4.
108. *See id.* at *1.
109. *See id.* at *7.
110. *See Lukumi*, 508 U.S. at 520.

chose to highlight, the court gave serious weight to the defendants' individual history, *before* they became village officials, of unabashed civic agitation against the Orthodox Jewish community. But it is unclear whether a public official's prior activism and intent can always be imputed to his subsequent official acts that appear facially neutral. The *Fletcher I* court's willingness to probe the factual record *à la Lukumi* to ascertain motive suggests that the aggregation of these motives—even if they are expressed unofficially, as here—have significant weight in the scales of decision. On the other hand, perhaps few cases will contain a record of animus as clear as *Fletcher*.[111] Without such a convincing record of ill intent, courts will likely find intent to be "neutral" and burdens on religion "incidental," and thus permissible.

B. Impact of the Court's Decisions on the Law

The results of the *Fletcher* decisions suggest a modest but significant victory for advocates of religious liberty. It is modest because the holding may be limited to situations in which religious animus clearly motivates the challenged state action. It is significant because the Second Circuit reinforced two principles that aid churches with Free Exercise claims. First, it indicated that the right of Free Exercise contains *a locational component*, though courts have not traditionally so held.[112] Second, the strong set of judicial remedies applied may enhance the ability of other religious organizations, especially home worshippers, to obtain redress.

1. The right to Free Exercise: a locational component

In recent decades, courts deciding religious land use cases have "ignore[d] the reality that property and religious exercise are inextricably linked,"[113] even though the "right to create [physical] worship space" is arguably a "core First Amendment right."[114] Zoning ordinances are generally permitted to exclude a church "as long as an 'al-

111. *See* MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 251 (1996).

112. *See* CARMELLA, *supra* note 37, at 21.

113. *Id.* at 19. Property used for religious purposes "becomes an extension and embodiment of religious exercise [and] [t]he relationship between property and religion is thus a close one. But many courts miss this link." Carmella, *supra* note 42, at 584.

114. Laycock, *supra* note 40, at 758.

ternative location' is legally possible" and the discrimination is not overt.[115] Thus, worship in a *particular* location is typically not seen as inherent to religious freedom.[116] For example, one group for whom particular sacred locations have always been integral to religious exercise is Native Americans. Yet they have suffered from a "pattern of lower-court rulings against free exercise claims by [Native Americans] relating to government land use,"[117] capped by the Supreme Court's major adverse ruling in *Lyng v. Northwest Indian Cemetery Protective Association*.[118]

In *Fletcher*, however, the Second Circuit connected the location of worship with the right of Free Exercise. To give meaning to the Orthodox Jews' right to worship in Airmont, the injunction located that right in a rabbi's home. This sets a useful precedent for religious organizations whose religious exercise relates closely to location. Perhaps few groups share the quorum and transportation mandates of Orthodox Jewry. But the link between favorable locations and the vibrancy of religious activity conceivably affects many churches for whom frequent congregating and close community living are an exercise of faith.

This precedent, that religious exercise has a locational component, may improve the geographic mobility of believers from one neighborhood to another. In the instant case, it will likely undo the ACA's chilling effect on Jewish immigration from the village's hostility.[119] Now the religious rights of prospective residents of Airmont seem far more secure. This reassurance matters immensely to close-knit minority religions, because "in the absence of a willingness on the pa[rt] of local communities to accommodate the needs of Orthodox Jews for local houses of worship, [an Orthodox] community will be effectively locked out of many neighborhoods across this

115. CARMELLA, *supra* note 37, at 20.

116. *See id.*

117. Lupu, *supra* note 63, at 946 n.56.

118. 485 U.S. 439 (1988) (holding that burdens on Free Exercise imposed by logging activities in particular areas sacred to Native Americans do not require compelling governmental interest, because they only inhibit religious practices rather than *coerce* individuals into acting contrary to their beliefs). *See also* Ammoneta Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980) (holding that constructing a dam that would flood certain sites and cemeteries sacred to Native Americans was not a constitutionally cognizable infringement on Free Exercise).

119. *See* LeBlanc-Sternberg v. Fletcher, 781 F. Supp. 261, 271 (S.D.N.Y. 1991).

great land."[120] Recent decades have generated a pattern of "ostensibly neutral land use laws" that burden the Jewish religion "by not allowing Jews to worship within close proximity to where they live."[121] Thus, the court's change of the Village of Airmont's code has sent ripples across a debate with far-reaching demographic ramifications.[122]

Orthodox Judaism's demanding standards render it particularly vulnerable to hostility in suburbs such as the Village of Airmont. But other religious groups similarly suffer from exclusionary neighbors. "Towns have overwhelmingly used zoning laws to prevent minority denominations from locating in their communities."[123] As Airmont's Orthodox Jews have learned, these exclusionary impulses are compounded if membership in a given church also connotes an ethnic identity. For example, the zoning authorities of Wayne, New Jersey, denied a permit to a black church because of one town official's vocal opposition, fearing a racial transformation of the neighborhood.[124] Officials in Clifton, New Jersey, denied permits to a "black" mosque four times, citing parking problems; but later, they approved a "white" church nearby that presented identical parking concerns.[125] Similarly, zoning officials manipulated parking rules to effectively exclude any mosque from a Mississippi community in *Islamic Center v. City of Starkville*.[126]

The Second Circuit's invalidation of the Airmont Village ordinance in *Fletcher I* runs counter to the trend in federal jurisprudence. Courts typically defer to a municipality's restrictions on church locations, as long as the restrictions fall short of outright prohibition and an alternative location for the church theoretically exists, even if the

120. *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the Senate Comm. on the Judiciary*, June 23, 1998 (statement of David Zwiebel, general counsel for Agudath Israel of America, the nation's largest grassroots Orthodox Jewish organization) *available in* LEXIS, Federal News Service File [hereinafter Zwiebel Statement].

121. *Id.*

122. *See* Brief of the Church of Jesus Christ of Latter-day Saints as *amicus curiae* in Support of Respondents at app., City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074) [hereinafter *LDS Church Amicus Brief*]. The brief's appended statistical survey reveals that smaller churches must fight much harder than mainline churches to secure accommodation under zoning codes.

123. Rebecca Beynon, Regulation of Church Land Use and Discrimination Against Minority Faiths 46 (1993) (unpublished manuscript, on file with author).

124. *See* Laycock, *supra* note 40, at 781.

125. *See id.*

126. 840 F.2d 293 (5th Cir. 1988).

alternative is impractical or financially prohibitive.[127] But because the *Fletcher* case contained an unusually clear intent to discriminate,[128] the Second Circuit's holding alone may not reverse that trend, and may be limited to cases with similarly compelling facts.

2. Enhanced remedies: extensive injunctions and attorneys' fees

In *Fletcher II* and *Fletcher III*, the Second Circuit employed two powerful remedies in granting relief to the plaintiffs. This precedent may enhance the ability of future Free Exercise claimants to obtain relief. The court both narrowed the Village of Airmont's zoning discretion and relieved the plaintiffs of the onerous burden of attorneys' fees and costs.

a. Injunctive relief. The set of injunctions upheld in *Fletcher II* sharply curtailed the village's discretion in zoning decisions affecting religious exercise. Previously, the sword of Damocles dangled above the home worship meetings, hanging by the thread of village discretion. The court responded vigorously. The specificity of the injunctive relief should encourage advocates of religious liberty. Even though zoning is traditionally a local function, this federal court found that extensive intervention was justified. Even before Airmont Village abused its discretion, the injunctions rewrote portions of the zoning code, mandated that the zoning authorities construe certain provisions as permitting home worship, and put the board under judicial surveillance.

This remedy pinpoints the true danger for religious minorities in land use disputes: the wide (and easily abused) discretion that municipal zoning authorities enjoy, both in how rules are made and in how they are applied. A typical zoning board's level of discretion allows judgments that are so subjective that "[i]n the free speech context, we would call this standardless licensing, and it would be unconstitutional."[129] Land use regulation "is administered through highly discretionary and individualized processes that leave ample room for deliberate but hidden discrimination, and where there is substantial evidence of widespread hostility to non-mainstream churches and some hostility to all churches."[130] Moreover, if zoning

127. *See* CARMELLA, *supra* note 37, at 20.

128. *See* Beynon, *supra* note 123, at 21.

129. Laycock 1999 Senate Statement, *supra* note 29.

130. *Protecting Religious Freedom After* Boerne v. Flores: *Hearing Before the Senate*

boards, which are naturally sensitive to majoritarian pressures, reject the minority church's request, the church may have no effective recourse.[131]

In *Smith*, the Supreme Court worried that conditioning "an individual's obligation to obey [a generally applicable] law" upon the law's coincidence with his religious beliefs allows the belief-motivated individual "'to become a law unto himself.'"[132] A society of laws could simply not tolerate this result. But permitting the multitude of local zoning boards to reach decisions—without objective justification or effective oversight—permits *them* to become a law unto themselves.

The epilogue to the Second Circuit's three rulings hints at the risks of aggressive injunctive intervention. It may handcuff local officials. The court's remedy was so protective of home worship that the Orthodox Jews planned an enormous home-synagogue. Since the district court refused to approve in advance the village's contemplated restrictions, the village acts at its peril. If it wishes to enact even a reasonable measure limiting an Orthodox super synagogue, the village apparently must bear the full risk of judicial penalty if the court later finds the measure discriminatory. How many municipalities could afford that risk? How many well-intentioned and needful decisions will a municipality forego for fear of being misunderstood by a court?

On the other hand, a huge *home* synagogue seems a natural consequence of the village's hostility. Remembering the village's past intimidation, the Orthodox Jews may reasonably expect the village to deny site approval for a *free-standing* synagogue. Meanwhile, this planned home synagogue capitalizes on the one thing the Orthodox now know they *can* do in Airmont—worship in their homes. Why not build what they can before the village bureaucracy regains the upper hand? Moreover, given the practical difficulties of the residential real estate market, the hope of "locat[ing] a church in built-up

Comm. on the Judiciary, Oct. 1, 1997 (statement by Douglas Laycock, Professor, University of Texas Law School) *available in* LEXIS, Federal News Service File.

131. In some state zoning acts, there are no provisions for judicial review of decisions by local government bodies that administer zoning ordinances. *See* DANIEL R. MANDELKER, LAND USE LAW § 8.11, at 326 (2d ed. 1988).

132. *Smith*, 494 U.S. at 885 (citing Reynolds v. United States, 98 U.S. 145, 167 (1878)).

residential neighborhoods is illusory for all but . . . congregations [that] can meet in a single house."[133]

b. Award of attorneys' fees. The award of attorneys' fees and costs in *Fletcher III* demonstrated the court's proper understanding of what home-worship plaintiffs are really seeking. The court's interpretation of prevailing party recognized that the liberty interests redeemed by injunction far outweigh the failed claims for damages. Evidently, the court shared the view of Rabbi Sternberg's attorney that "the case 'was about the right to pray and not about money.'"[134] Like Rabbi Sternberg, plaintiffs who care more about freedom than damages—which is highly probable in lawsuits about religious exercise—are now more likely to be classified as prevailing parties and thus deserving of attorneys' fees if they secure at least injunctive relief.

The legal representation that rallied to the cause of the Orthodox Jews in the Village of Airmont indicates that they had powerful friends.[135] This court's standard for awarding attorneys' fees bodes well for churches with less powerful allies. It particularly favors small, minority churches in a crucial and practical way. A formidable study shows why they need this help.[136] It is smaller churches that are more often the subject of discriminatory zoning practices. Though minority churches represent only nine percent of the population, they are embroiled in half the lawsuits involving zoning and churches.[137] Once in court, interestingly, their rates of success approximate those of larger churches.[138] Even larger churches seem "more vulnerable than other projects of similar size to NIMBY[139] opposition" because "any one church may have only a few potential members in the immediate neighborhood,"[140] with the rest of its congregation spread out in various municipalities.

133. Laycock, *supra* note 40, at 761.

134. Hamblett, *supra* note 100, at 1 col. 5 (quoting Manhattan attorney Alan J. Straus).

135. The Attorney General of the State of New York, the Anti-Defamation League of B'nai B'rith, Agudath Israel of America, and the Rutherford Institute each filed an *amicus curiae* brief for the Orthodox and Government plaintiffs. *See Fletcher I*, 67 F.3d at 412.

136. *See supra* note 122.

137. *See LDS Church Amicus Brief*, *supra* note 122, at A-5.

138. *See id.* at A-7.

139. In public policy parlance, an acronym for a community's opposition to a proposed project: "not in my backyard."

140. Laycock, *supra* note 40, at 759 (explaining why virtually any church's members find themselves in a distinct minority in their municipality).

Even these startling statistics understate the problem. The expense of litigation often prevents many churches from filing suit. Most small churches "bend over backwards to avoid conflicts with future neighbors and city officials they must deal with on a continuing basis[,] . . . giv[ing] up on claims they may believe are valid in the interest of social peace."[141] It is not known how many incidents of discrimination go legally unchallenged because smaller churches cannot fund a fight. The prevailing party standard in *Fletcher III* would empower smaller churches with a promising equitable claim to seek redress in the courts. A readiness by courts to award attorneys' fees to a successful claimant would avoid the dilemma churches often face: suffering unconstitutional restraints or delving into the collection basket to fund uncertain litigation.

C. Recommendations for Moderate Protections

The recommendations below aim to enhance the protection of Free Exercise rights while fairly esteeming the interests of local governments in land use planning. They seek to improve the legislation and the standards which courts apply to resolve religious land use cases.

1. Narrow the discretion of zoning boards

a. Shift the burden of justification back onto governmental bodies. The level of discretion enjoyed by zoning boards varies widely among and within jurisdictions, and broad discretion threatens religious liberty. The law should protect religious exercise against substantial burdens by shifting the responsibility of justifying such burdens to the zoning boards.

How heavy should this burden of justification be? The RLPA bill retains the strict-scrutiny standard for governmental action that "substantially burden[s]" religious exercise.[142] But the burden of justification need not be that heavy to be effective; it need only place *some* responsibility on municipalities to effect a profound increase in Free Exercise protection. For example, the law could establish a "re-

141. *The Religious Liberty Protection Act of 1998: Hearing on House Bill 4019/1308 Before the Subcomm. on the Const. of the House Comm. on the Judiciary,* 105th Cong. 134 (1998) (statement by W. Cole Durham, Jr., Professor, Brigham Young University Law School) [hereinafter Durham Statement].

142. *See* 105 H.R. 4019, § 2(b) (1998).

buttable presumption" that governmental burdens (direct or incidental[143]) on religious exercise are invalid, or it could subject a municipality's reasons for an ordinance to greater—perhaps "heightened"—scrutiny, requiring a showing that the regulation "advance[] an *important* . . . governmental purpose."[144] Either approach would alter the balance by removing governmental bureaucracy's chief advantages: inertia and indifference. If the burden of justification rests with that bureaucracy, then neither bureaucratic inertia nor indifference could crush a religious exercise claimant.

A heightened scrutiny standard, located somewhere between rational basis and strict scrutiny, may be difficult to calibrate precisely, but it is workable.[145] For example, RLPA's land use provision requires the government to justify any regulation that "substantially burdens" religious exercise with a showing of "substantial and tangible harm" to the community. A heightened standard would be most effective at the extremes, validating significant governmental reasons and exposing pretextual ones, like the Village of Airmont's reasoning that Orthodox Jews—doctrinally bound to walk reverently to services—are a source of traffic and noise. Thus courts could balance interests, but with a modest burden of persuasion on the municipality.

Shifting the burden of justification away from churches and onto a municipal bureaucracy (with its potentially large public resources) will cause even well-intentioned zoning boards to weigh more cautiously, and tailor more closely, proposals that may burden religious exercise. The frequent "approximation and imprecision" of zoning regulations "may interfere with religious exercise without furthering any municipal interest."[146] Shifting the presumption will yield Parato optimality,[147] where otherwise zoning boards could remain insulated

143. *See* Dorf, *supra* note 64, at 1199 (contending that the law should recognize certain incidental burdens as "infringements of constitutional rights" and therefore subject to some form of heightened scrutiny).

144. Pearlman & Meck, *supra* note 11, at 139 (emphasis added).

145. *See* Dorf, *supra* note 64, at 1199-1200 (discussing various models for approaching incidental burdens and concluding the "best options" apply some form of heightened or strict scrutiny to certain incidental burdens).

146. Carmella, *supra* note 42, at 575.

147. In economic theory, Parato optimality is an arrangement by which each side has moved to a point where any further increase in utility for one party will necessarily decrease the other's utility. The theory is best understood in terms of indifference curves. It recognizes that, if parties have differing values, after party X achieves a certain level of utility, party Y may *still increase* its utility by shifts *to which party X is indifferent*, until the shifting reaches the point of Parato optimality. For purposes of this discussion, a church's religious goals presumably differ

and indifferent to the incidental or unintended consequences of their regulations.

b. Courts should probe for threats to religious exercise. Courts should probe for discriminatory intent, rather than deferring to municipal decisions, whenever intentional threats to fundamental rights such as Free Exercise are suspected from the record. Admittedly, discerning motive may prove too difficult at times, as "courts are often reluctant to attribute the collective decision" to the expressed discriminatory motive of individual policy-makers.[148] As the historic defender of the out-voted minority, courts have an affirmative duty to protect fundamental liberties, despite *Smith*'s apparent abdication of such responsibility for Free Exercise. Otherwise, the noble guarantees of liberty in law will fade into the majority's discretionary preferences and prejudices. "Of our public decision-making practices, only adjudication imposes obligations to decide and give public reasons for the decision,"[149] which makes courts—and their ability to require governmental bodies to give public reasons—indispensable to the protection of religious exercise.

As it minimized the judiciary's role regarding Free Exercise, the majority in *Smith* admitted that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government."[150] In subsequent testimony before Congress, an expert responded that "[f]rankly, that had not been our understanding. We had always thought that the freedoms enumerated in the Bill of Rights were designed to protect the vulnerable minority from the tyrannical majority."[151] Vulnerable to the discretion of zoning boards, religious minorities need the affirmative protection of a court that can request that municipalities publicly justify the burdens they impose.

from a municipality's goals (e.g., health and safety). Often, a town can maintain its desired level of health and safety and still allow a church certain shifts that increase its religious exercise. This shifting, however, requires municipal sensitivity; a town unaccountable for the incidental burdens it imposes will lack incentives to accommodate a church.

148. Laycock 1999 Senate Statement, *supra* note 29.

149. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 593 (1998). *See id.* (assessing reasons for judicial hesitancy regarding religious exemptions).

150. *Smith*, 494 U.S. at 890.

151. Zwiebel Statement, *supra* note 120.

c. Legislatures should compile a record of zoning discrimination against religious exercise. Though the Supreme Court in *Boerne* invalidated RFRA as overreaching, none of the Court's precedents suggest "that there is anything improper about the congressional objective of protecting religious freedom beyond the constitutional minimum."[152] In *Boerne,* the Court agreed that Congress may regulate government practices which "have a significant likelihood of being unconstitutional."[153] The high risk of purposeful discrimination in zoning decisions arguably makes these "government practices" a deserving target of legislation. For example, Congress could heighten scrutiny by declaring "presumptively unlawful all governmental practices in these areas [including land use] that can be proven in litigation to have a substantially discriminatory effect on religion."[154]

At minimum, legislative attempts to protect religious freedom must, like RLPA, learn the lessons of *Boerne.* They must respect the Supreme Court's historical prerogative of constitutional interpretation; invoke firm constitutional authority; and compile a more comprehensive record of the Free Exercise violations that necessitate legislative redress. Such legislation must also respect federalism's restraints. RLPA, for instance, has been promoted as "not a bill to regulate the states; it is a bill to deregulate religion."[155] Federal overprotection of religious exercise would prove counterproductive, even for religious interests. Religious "excesses" far greater than a 16,580 square-foot home synagogue could proliferate, beyond the reach of a municipality's sensible regulation. If legislation narrows municipal zoning discretion too much, it increases the incentives for municipalities to fight harder to exclude churches entirely at the outset, fearful that once new churches become entrenched, they would be immune from local control.[156]

2. Judges and litigants should avoid the hybrid rights approach

Governmental action that abridges Free Exercise often tears at a web of rights—equal protection, due process, free speech, or free as-

152. McConnell Statement, *supra* note 28.

153. *Boerne*, 521 U.S. at 512.

154. Conkle, *supra* note 24, at 650.

155. Laycock 1999 Senate Statement, *supra* note 29.

156. *See* Pearlman & Meck, *supra* note 11, at 135.

sembly.[157] While noting the other fundamental rights implicated in a given Free Exercise claim may illuminate the issues, judges and litigants should avoid the "hybrid rights" characterization offered in *Smith,* which reasoned that burdens on Free Exercise do warrant strict scrutiny if they infringe on at least one other fundamental right.

Indeed, the right of Free Exercise will often be bound up with other rights. In *Fletcher I*, the ordinance violated individual rights on two independent grounds: Free Exercise, and equal protection rights under FHA. In a land use case in the Tenth Circuit, a dissenting judge expounded on this strong connection among fundamental rights in the religion context.[158] Places of worship should enjoy protection under the First Amendment "not only because housed worship has been historically central to religion but also because such activities necessarily involve speech and assembly."[159] Because a house of worship is usually the *only* place of religious assembly and the central place for the expression of religious speech, courts should scrutinize ordinances inhibiting houses of worship as strictly as speech and assembly ordinances.

But lumping Free Exercise in with other fundamental rights poses an insidious threat to religious exercise. Lamentably, *Smith*'s hybrid rights approach yields ironic incentives for Free Exercise claimants. It lures the Free Exercise plaintiff to attempt to trigger strict scrutiny by adding related fundamental rights to create a multi-pillared hybrid claim. This capitulates to *Smith*'s characterization of Free Exercise as a dependent right, incapable of triggering strict scrutiny on its own. This conceptualization of Free Exercise as an inferior right will degrade religious liberty. Upholding religious freedom by reliance on clauses other than Free Exercise will distort the law. The Founders wrote no second tier into the First Amendment for not-so-fundamental rights. For those claims that happen to implicate no other fundamental right, Free Exercise should stand alone as defense enough.

The danger that Free Exercise will degrade into a dependent right is real. One prominent view among scholars characterizes

157. *See* Wehener, *supra* note 34, at 511.

158. *See* Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 831 (10th Cir. 1988) (McKay, J., dissenting), *cert. denied*, 490 U.S. 1005 (1989).

159. *Id.*

church-state jurisprudence as the product of competition between an *equality* paradigm and a *liberty* paradigm.[160] "Equality rights generally prevent government from imposing a burden on one person unless it imposes the burden on everyone. Liberty rights generally prevent the state from imposing the burden at all, even if it imposes it on everyone."[161] The central, foreboding feature of the post-*Smith* era seems to be that the "significance of religious freedom is being eroded by the ascendancy of the equality paradigm over the liberty paradigm in legal thought."[162] Rather than adopt a robust, liberty-oriented conception of Free Exercise, "[c]ourts seem especially uncomfortable with claims of religious exemption" for reasons inherent to religion.[163]

The courts should not interpret Free Exercise as anything less than it was meant to be, as Justice O'Connor argues in her dissent in *Boerne*. She warns that

> the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment . . . . Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law.[164]

This perspective properly interprets Free Exercise as an essential element of liberty, not a principle of equality. The equality standard is simply inappropriate because nothing is quite like religion. It has merited special protection since the Pilgrims.

> Whatever one ultimately thinks about the balance of liberty and equality, it is fair to say that the greatness of our tradition in religious liberty will be impoverished if we do not understand that at its core it is about the protection of religious differences, religious pluralism, and religious conscience, and that sometimes the values

160. *See* W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection,* 32 U.C. DAVIS L. REV. 665, 670-76 (1999); *see generally* Carmella, *supra* note 42.

161. Frederick M. Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions,* 20 U. ARK. LITTLE ROCK L.J. 555, 568 (1998).

162. Durham, *supra* note 160, at 670.

163. Lupu, *supra* note 149, at 593; *see generally* Gedicks, *supra* note 161.

164. *Boerne*, 521 U.S. at 546 (O'Connor, J., dissenting).

> are so strong that they even override otherwise relevant equality claims.[165]

Churches play a role in society unlike their fellow plaintiffs in land use disputes: shopping malls, liquor stores, and adult dance clubs. Their unquantifiable but unmistakable social value deserves special weight in the scales of justice and the corridors of policy. This is ever more urgent as municipalities face mounting obstacles to protecting the public health, safety, morals, and general welfare of their residents.

V. CONCLUSION

The fundamental questions of the Free Exercise debate focus on the proper scope of religious exercise and how to balance it against contrary governmental interests. In the land use context, the courts have adopted divergent approaches in analyzing how much the Constitution protects religious exercise from burdens imposed by zoning ordinances. The Second Circuit's decisions in *LeBlanc-Sternberg v. Fletcher* presented a modest but significant victory for religious exercise. The court demonstrated that location is an integral aspect of religious exercise. Its comprehensive injunctive remedy suggested a greater affirmative duty on the court to protect religion. As one of only three federal circuit rulings on home worship, this precedent should assist other small religious groups seeking to defend this right. The award of attorneys' fees for winning injunctive relief may embolden smaller religious groups to demand constitutional protection in court.

This legal controversy bears enormous importance beyond the courtroom. It influences how we build and manage and belong to our own communities in America. It relates to an individual's rights within his home and neighborhood. It asks whether the law can effectively protect those individuals whom a community wishes to exclude because of their faith. In short, it affects how we treat those who are our neighbors.

Religious freedom has no secular analogue. Its significance to liberty warrants special protection. For persons of faith, religious liberty is of unique importance—for many, of ultimate importance—and thus "important enough to die for, to suffer for, to rebel for, to

165. Durham Statement, *supra* note 141, at 134.

emigrate for, to fight to control the government for."[166] It cannot be understood merely through association with other fundamental rights. It requires the affirmative protection of legislatures and courts against the discretion of zoning authorities.

The Founders listed religious liberty as the first freedom of the Republic. The right to worship freely in homes and in public locations is an article of faith in America. The positive social value of religious organizations deserves the law's reconsideration. As municipalities increasingly struggle to protect the health, safety, and morals of their residents, courts, and legislatures would do well to consider whether vibrant religious communities and favorably-located churches are not powerful and natural allies to these salutary public interests.

John M. Smith

166. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. OF CONTEMP. LEGAL ISSUES 313, 317 (1996).